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### Lights Hidden Under Bushel's Case

Thomas A. Green

*University of Michigan Law School, [tagreen@umich.edu](mailto:tagreen@umich.edu)*

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## Lights Hidden Under *Bushel's Case*

Thomas A. Green<sup>1</sup>

Some forty years ago, Charlie Donahue created a course which he titled "Law, Morals and Society." Designed for undergraduates, and situated among the offerings of the University of Michigan's interdisciplinary Medieval and Renaissance Collegium, the course reflected the approach to doing history that, as this volume recognizes, Charlie has followed throughout his long and enormously influential career as scholar, teacher, lecturer, and irrepressible master of well-timed interventions during conference-panel discussion periods. "LMS" was composed of four units. Charlie, who taught two of them, led off with the legal basis for the deposition of Richard II; I followed with the law of homicide in medieval England; Charlie returned with a unit on the law of marriage; Tom Tentler anchored the relay with the law relating to witchcraft. In each unit, we began with documents that expressed the law involved, and just as the students began to feel comfortable with those documents and the way what they expressed seemingly helped to organize a bit of the premodern world, we subjected the law to an investigation based on political, social and cultural contexts that rudely upset initial conceptions of how that bit of the world was organized—of just what constituted the law, and in what way whatever was the law can be said to have gone about its organizing work. A very Charlie sort of course.

1. I thank Elizabeth Papp Kamali and Michael Lobban for insightful comments on an earlier draft of this essay and Brittany Harrison for excellent editorial help.

At the time, I was teaching a seminar on the history of the criminal trial jury in England and America. Jury independence, and even jury nullification, played a large role. Hence my interest in *Bushel's Case* and, thanks in large part to Charlie, my interest in the light that its context shone on the opinion. So what *was* its context? A very Charlie sort of question, but I don't recall what Charlie said one ought to do if it didn't appear to have an answer. Surely he didn't advise turning one's musings about it into a *Festschrift* essay! *Mea culpa*, Charlie.

### THE TEXT INTRODUCED

*Bushel's Case* (1670)<sup>2</sup> was mysterious to me some thirty years ago, when I devoted a long chapter to the case and its context, and I am even more perplexed by it today.<sup>3</sup> That it was a mystery was not quite my point in 1985; it is, however, the point of this brief return to the case by way of comment on some recent work that aims to shed light on the opinion of John Vaughan, Chief Judge of Common Pleas, writing for all of the active high judges of England. Directed at the opinion itself, which held that jurors could not be fined or imprisoned on the grounds that their verdict was against fact or law, the new light plays on the soil out of which the opinion arose. We are left to speculate about whether, and to what extent, what the light reveals actually nourished one of the stateliest of growths in the forest of English law.

On the face of it, there is little mystery as to the reasons Vaughan adduced for his holding. A judge could not be certain jurors had gone against the facts as they perceived them; therefore, as law arises from the facts, the judge could not be certain jurors went against the law. Why could the judge not know jurors abused their fact-finding authority? Because the jurors might have out-of-court knowledge of their own regarding the facts or reliability of witnesses in a particular case; because the jurors might reach a different understanding than the judge with respect to in-court testimony ("even then the Judge and jury might honestly differ in the result from the

2. Vaughan 135, 124; *English Reports* 1006 (1670).

3. Thomas Andrew Green, *Verdict According to Conscience: Perspectives on the English Criminal Trial Jury, 1200–1800* (Chicago: University of Chicago Press, 1985), ch. 6.

evidence<sup>4</sup>), and it was the jurors' understanding that counted. Why was it the jurors' understanding that counted? Because the common law, by long tradition, proceeded by trial by jury, which would be a waste of time if judges could supplant jurors' understandings with their own, and it would be unreasonable to make jurors swear to what they did not believe.<sup>5</sup>

This seems tolerably clear as a set of general propositions that effectively establish a plenary rule. All cases short of those involving provable ministerial wrongdoing—i.e., verdicts tainted by bribery, coercion, etc.—are shielded from inquiry by the very logic of such a rule. There might be thought a weakness here. If the assumption is that jurors are not permitted to reject the judge's instructions as to law, why is their compliance with that instruction not subject to investigation? Possibly it is subject, up to a point—by having jurors state on oath that they did not reject those instructions (According to the logic of the rule, such an oath would leave no basis for certainty of their non-compliance). But why only up to that point? Why not require jurors to state the facts found (or the opinions they entertained as to witness credibility) that led them to acquittal within the parameters of the instructions? The answer, one supposes, is that judges can't judge the veracity of such sworn responses, for the very reasons underlying the rule. There is also the possibility of an unstated broader consideration here: such close questioning might amount to a form of coercion. Jurors might be led into swearing what they did not believe "though the [induced/coerced] verdict be right."<sup>6</sup>

The breadth and conclusiveness of the ruling in *Bushel's Case* are apparent when one considers the immediate context in which the case arose. Edward Bushel was one of the jurors imprisoned (until they paid a heavy fine) for their verdict of acquittal in the prosecution, in 1670, of William Penn and William Mead for unlawful assembly and disturbance of the peace. The two Quaker preachers had preached in Gracechurch Street, London, and had not desisted when ordered to do so, at which point a tu-

4. Vaughan, 147; *English Reports*, 1012.

5. Vaughan, 143; *English Reports* 1010; Vaughan, 148; *English Reports*, 1012-13. Also, importantly—but without explanation—Vaughan ventured that to "omit" or "abolish" the criminal trial jury would be "the greater mischief to the people, than to abolish them in civil tryals." Vaughan, 144; *English Reports*, 1010.

6. Vaughan, 148; *English Reports*, 1013.



mult had ensued. According to those trial accounts that we have (mainly one by Penn<sup>7</sup> and one by Samuel Starling, Lord Mayor of London, who presided at the trial),<sup>8</sup> Penn questioned the law underlying the indictment and exhorted his jurors to adjudge that law insufficient, against the laws of England.<sup>9</sup> Penn was removed from the courtroom proper for his statements and behavior; within his hearing, the trial continued, over his outcries from the bale dock to which he had been consigned. The jury divided, eight for guilty, four not, and was sent out to reconsider, whereupon the jurors returned a verdict of "Guilty of speaking in Gracechurch Street." Sent out again, upon orders to reach a general verdict, the jurors agreed on acquittal. Bushel, deemed one of the leaders of a court-room insurrection, refused to pay the fine and sued out a writ of habeas corpus addressed to the Court of Common Pleas, Vaughan presiding. After some doubts—Vaughan expressing them for his own part—about whether Common Pleas was the proper venue for such a writ, the Court accepted the case based upon the return to the writ, which alleged that the prisoners had, as jurors, found against the fact and against the law. After a plenary session with the other common law judges (save for John Kelyng, Chief Judge of King's Bench, whose illness had sidelined him), Vaughan authored the ruling outlined above.

It is, I suppose, imaginable that the jurors could agree only that Penn and Mead had preached in Gracechurch Street, but not that they had caused an unlawful assembly or a disturbance of the peace, even under the law as it was understood by the bench. One doesn't need to blot out Penn's exhortations regarding the law, or the possibility that they had some effect upon the jurors. One might suppose it possible that those pleas to the jurors merely reinforced their sincere inclination to view the facts as unproved. Or reinforced their doubts about the credibility of crown witnesses, or their susceptibility to believe out-of-court evidence—e.g., statements by some of those present at the preaching that had come to the attention of some of the

7. William Penn and William Mead, *The People's Antient and Just Liberties* (London: n.p. 1670), printed in *State Trials*, 6.951–1000. (References hereinafter are to *State Trials*.)

8. Sir Samuel Starling, *An Answer to the Seditious and Scandalous Pamphlet, entitled, The Trial of W. Penn and W. Mead* (London: W.G., 1671).

9. *State Trials*, 6.959.

jurors. Conceptually, at least, it is possible that Penn and Mead's case fell within the logic of the ruling in *Bushel's Case*, including, importantly, the logic that an inquiry to determine whether or not it did was itself precluded. The rule in *Bushel's Case* was that conclusive.

### WIDER CONTEXTS INTRODUCED

Two recent and important discussions of *Bushel's Case* attempt to explain Vaughan's opinion—either what he really had in mind or what led him, perhaps subconsciously, to think about jury trial in the way that he did. Neither account denies the possible influence of the immediate political and legal context that scholars have sometimes emphasized. The main (and by now familiar) elements of that context include: worries about the restored monarchy's manipulation of the judiciary and suppression of liberties; the spate of jury finings in the 1660s (King's Bench Judges Hyde, Twisden, and Kelyng being the most commonly cited); Commons' censure of Kelyng on grounds of fining and disrespect for Magna Carta; Vaughan's leading role in Commons' anti-fining campaign.<sup>10</sup> What the new accounts intend, rather, is the supplying of a philosophical framework for Vaughan's and others' opposition to fining, one that helps to explain that opposition and is not merely the plaything of the politics of the day.

James Whitman comes at the opinion from the perspective of what he terms a "moral comfort" rule, that, from the Middle Ages forward, applied to judges and jurors: according to theological prescript, one's soul was imperiled by wrongful conviction in cases involving the blood sanction (and perhaps even more broadly), but honest belief that guilt was beyond a reasonable doubt protected one against such peril.<sup>11</sup> This, Whitman claims, is key to understanding the importance of, and the respect accorded to, verdicts according to conscience throughout the common law period, at least into the eighteenth century, and especially in felony, which was almost uni-

10. This background is discussed in, e.g., Green, *Verdict According to Conscience*, 208–21; John A. Phillips and Thomas C. Thompson, "Jurors v. Judges in Later Stuart England: The Penn/Mead Trial and *Bushell's Case*," *Law and Inequality* 4 (1986), 189–229.

11. James Q. Whitman, *The Origins of Reasonable Doubt: Theological Roots of the Criminal Trial* (New Haven: Yale University Press, 2008), ch. 6.

formly capital. There is great power in this account. The challenge it poses for our understanding of the medieval English criminal law is only now being met.<sup>12</sup> Whitman invites the reader to consider Vaughan's opinion in light of this longstanding context, the theology of "moral comfort," still, he argues, both identifiable and broadly influential in late-seventeenth-century legal-moral thought. It helps us to understand judicial reticence to take the verdict-rendering act into their own hands; to see that the creation and retention of trial by jury had a deep underlying logic—indeed, a moral dimension; to recognize that the too-close questioning of jurors' motivations threatened to disturb what was thought best left between them and their own consciences—that is, between them and God. Armed with these insights, we are able to appreciate Vaughan's invocation of what might otherwise seem an insincere—because no-longer often applicable—claim that jurors might (for all the judge can ever know) have brought to bear private knowledge in their fact-finding process.

Kevin Crosby, too, focuses on "the role of conscience in jury deliberations" in his enterprising article, "Bushell's Case and the Juror's Soul."<sup>13</sup> Crosby recognizes the foundational importance of Whitman's work, but he sees Whitman's perspective as limited:

Whitman's focus on the moral dangers of judging, and the concomitant need to find ways of soothing judges' consciences, means that the focus in his account is on how criminal justice systems have coaxed cautious judges (which here includes jurors) into convicting. This is an important perspective. However, it downplays the capacity of the later seventeenth-century criminal jury to do something other than what the other actors involved in the administration of the criminal law would have liked it to do.<sup>14</sup>

The period in fact witnessed a flowering of jury-independence theory, a concept of the jury wherein the individual juror's conscience—his "soul"—was paramount: "*Bushell's Case*, taken together with the concur-

12. See Elizabeth Papp Kamali, "A Felonious State of Mind: Mens Rea in Thirteenth- and Fourteenth-Century England" (Ph.D. dissertation, University of Michigan, 2015).

13. Kevin Crosby, "Bushell's Case and the Juror's Soul," *The Journal of Legal History* 33 (2012), 251–290, at 253.

14. *Ibid.*, 253–54.



rent pamphlet literature, offers a positive model of jury trial which downplays the jury's relationship either with the judge's or with the sovereign's laws in favour of a focus on the jurymen's soul.<sup>15</sup> Once we see this, we see "moral comfort" relative to convicting a defendant as only one aspect of a verdict according to conscience at the time of *Bushel's Case* and of less importance than the contemporary reconceptualization of the relationships among institutions of governance. We see that jury theory now embraced a positive and constitutive idea of the "juror's soul." This development marked a significant departure from traditional theory, according to which the jury was understood precisely in relation to the monarch and/or judge. Crosby draws clear contrasts between late-seventeenth-century jury theory and those of Coke (who emphasized the role of the judge in relation to the jury) and Hobbes (who emphasized the role of the sovereign), and whose own great differences pale alongside the differences between them and the "soul"-based radical jury independence that was to follow: jurors' primary duty was to themselves, not to the bench or crown. We are invited not only to read Vaughan's opinion in light of this new model of jury trial and jury theory, but to see that opinion as expounding the new positions.<sup>16</sup>

It is useful, I think, to view Whitman's and Crosby's approaches to the context of Vaughan's opinion in *Bushel's Case* both separately and conjointly. These are both highly sophisticated, intricately woven accounts of jury theory extending over lengthy periods, each deserving fuller consideration than it will receive here, as my main objective is to think out loud about their relation to Vaughan's opinion. Whitman begins his English-side account with the thirteenth century and carries down to modern times, focusing on *Bushel's Case* at one turn in his story. Crosby, though aiming at and ending with that case, interprets late seventeenth-century jury theory in relation to currents of that theory dating from the fifteenth century. Crosby's account may be said to fit into Whitman's at the macro level: conscience and duty in the eyes of God forms a background for him. But his study grows outward from there. Crosby postulates that from the concern identified by Whitman, and other more political-theory-based strains of thought, came a positive conception of jury independence that

15. Ibid., Abstract.

16. Ibid., 270-80.



affected the rendering of verdicts generally in criminal cases. The implications of this difference seem modest when one focuses on their more or less equal concern with what they take to be a distinctly contemporary resonance in Vaughan's invocation of conscience. They differ, however, in the particular contemporary writings upon which they focus in providing context for that invocation (a matter not discussed here). As already noted, their differing approaches produce different proposed insights into either what Vaughan was really thinking or why Vaughan—perhaps unselfconsciously—came out the way he did.

#### THE TEXT IN RELATION TO THE PROPOSED CONTEXT(S)

##### *Personal Knowledge*

Even one who would assert that the true basis for the opinion remains a matter of Vaughan's *own* personal knowledge would quickly agree that jurors' personal knowledge played a significant role in the Chief Judge's thinking. The questions that historians are left with have to do with how Vaughan mainly defined personal knowledge and his reasons for giving various forms of that knowledge real or apparent weight. The classic form of such knowledge—and the one that seems to dominate the opinion—is pre-formed, out-of-court knowledge concerning the facts of the case at hand. These might be physical or mental facts, that is, facts about what the defendant did or thought that were not brought forward at the trial. They might also be "background" facts about the defendant or witnesses that a juror (or jurors) thought affected the credibility of what parties said in court.<sup>17</sup>

This kind of knowledge has obvious roots in "self-informing," long assumed to be a staple of early-jury process. It is generally agreed that by the late seventeenth century—indeed, well before—self-informing in the literal sense was a relatively rare feature of criminal process. But if one expands the literal meaning to something like an awareness of community-based understandings—even rumors—the situation is more difficult to assess. Pre-trial process, including coroners' inquests (in homicide), depositions, and grand jury proceedings, yielded information available to the bench

17. See especially Vaughan, 147; *English Reports*, 1012.

and, where read aloud in court, to jurors, but those records were not taken to include most discordant minority views, including some that might have been in circulation. Of course, they needn't be comprehensive so long as jurors were legally bound to render a verdict solely on the evidence given at the trial. But just where such a rule stood in that regard as of the late seventeenth century is open to question. For his part, Vaughan did not deem there to be such a rule; that's the basis of his stated reliance—to whatever extent genuine<sup>18</sup>—on this kind of personal knowledge.

The second form of personal knowledge might better be termed a right to make an independent assessment (interpretation) of in-court testimony (sworn and unsworn). This assessment involved what facts were truly in play, which in turn involved an assessment of narratives and, importantly, of the credibility of narrators. The two forms of personal knowledge overlap at a point: that is, where pre-formed knowledge/impressions colored assessment of in-court narratives/narrators. But Vaughan can certainly be

18. Focusing on Vaughan's heavy reliance on the literal form of personal knowledge, John Langbein has characterized Vaughan's opinion as "wilfully anachronistic" and "dishonest nonsense." John H. Langbein, "The Criminal Trial before the Lawyers," *University of Chicago Law Review* 45 (1978), 299, nn. 105 and 298; see also John H. Langbein, *The Origins of Adversary Criminal Trial* (New York: Oxford University Press, 2003), 324. Langbein aptly criticizes Vaughan's handling of sixteenth-century precedent regarding jurors' personal knowledge and rightly mocks Vaughan's hardly credible claim, that (in his own day) "the better and greater part of the evidence may be wholly unknown [to the judge]; and this may happen in most cases, and often doth...." Vaughan, 149; *English Reports*, 1013. Langbein, *Criminal Trial before the Lawyers*, 299, n. 105. Langbein also notes contemporary evidence for the fining of jurors which Vaughan omits from his opinion, and he explains the opinion largely in terms of its political context. *Ibid.*, 299–30, 106–108. Those who have recently sought to relate Vaughan's text to a broader (and more high-minded) context have not fully rebutted Langbein's arguments for treating it as mere pretext. Whitman, *Origins of Reasonable Doubt*, 176–78 makes a compelling case that Vaughan's stress on out-of-court personal knowledge fit into a well-known tradition in moral theology writings that still carried weight and that related closely to "moral comfort" concerns. Vaughan's claim that such knowledge was a commonplace, however, strikes a distinctly false note and perhaps calls into question Vaughan's motivations in effecting this fit. In any event, as the text that follows suggests, I myself wonder whether this form of personal knowledge was in fact Vaughan's main concern. For an important article on the centrality of literal personal knowledge in post-Bushel's Case jury writings, see Simon Stern, "Between Local Knowledge and National Politics: Debating Rationales for Jury Nullification After *Bushel's Case*," *Yale Law Journal* 111 (2002), 1815–2002.

read to countenance the second form as operating entirely separately from the first. Such a reading appears to rest upon the famous words:

A man cannot see by another's eye, nor hear by another's ear, no more can a man conclude or infer the thing to be resolved by another's understanding or reasoning; and though the verdict be right the jury give, yet their not being assured it is so from their own understanding, are foresworn, at least *in foro conscientiae*.<sup>19</sup>

It rests, as well, on Vaughan's observation that, even were the jury to have no evidence other than that deposed in court, even then the Judge and jury might honestly differ in the result from the evidence, as well as two Judges may, which often happens.<sup>20</sup>

Vaughan's language here clearly embraces "understanding" of what is seen and heard, and might go no further than what one would consider sheer cognitive and/or intuitive powers, thus not embracing assessment based on credibility. Or, more broadly, it might embrace credibility based on tone and demeanor. But this particular language does not embrace credibility that was based (as other and more prominent parts of his opinion are) on out-of-court personal knowledge about the parties. Those other parts of the opinion are open to the objection that Vaughan well knew such personal knowledge was mostly obsolete. This language is not open to that objection.

And it is this language that shades off into intuition, impression regarding fact or psychology that might be thought the ultimate defense of jury independence. One could rule against out-of-court personal knowledge—require jurors to swear to such knowledge in open court, thus converting it to in-court testimony. But could a judge, as a purely practical matter, identify and rule against in-court personal understandings on the basis that he could be certain that they were insincere, or sincere but wrong, misguided, overly sympathetic? Vaughan claimed the judge could not. Can the historian, as judge, claim with certainty that *he* was being insincere?

This is not to say that, over and above the practical impossibility of such a ruling, there were not moral or ethical bases for precluding such a

19. Vaughan, 148; *English Reports*, 1012–13.

20. Vaughan, 147; *English Reports*, 1012.



rule, ones that rose to the level of legal mandate—even to what might be called constitutional mandate.

### *The Moral Bases for Independence*

Purely as a matter of theory, Whitman's "moral comfort," Crosby's independence-based-on-juror's-soul, and constitutionalism are analytically separable but also eminently analytically conjoinable. They can be brought together because a sheer constitutionalism begs questions as to just why the constitution stands as it does. And the answers given to this query at any particular time—and in any particular context—might be various, ranging from "It just is" to any of a number of considerations, some of which might have always been present in thinking about the jury, some of which might have been of more recent vintage, from some time ago to the virtual present.

Vaughan, of course, did not settle for "It just is." His opinion is devoted to listing the many reasons why the jury's verdict (and the jurors themselves) could not be assailed. I have previously examined those reasons in detail, so shall not repeat myself here. What remains a bit puzzling about Vaughan's opinion is not only his failure (as I have earlier stressed)<sup>21</sup> to advert to (and dismiss) the arguments for true law-finding that Penn made at his trial and that surfaced in numerous writings of the day, nor is it only Vaughan's total erasure of Restoration precedents for fining and the politics in which he himself had played a prominent role. One might now add to those puzzling matters Vaughan's silence about the awkward position (regarding "moral comfort") that Whitman shows some contemporary observers recognized the jury as being in.<sup>22</sup> One might wonder, as well, why Vaughan said so little—if anything—about the juror's "soul" and nothing explicit about the idea that the jury occupied a position independent of bench and sovereign.

One response to these new puzzles is simply that judges usually hewed to the law, stating it in "black-letter" terms and explicating it along

21. Green, *Verdict According to Conscience*, 249.

22. The jury in Penn and Mead's trial was, of course, dealing with a misdemeanor, not with a capital offense. That might be thought an answer to this particular conundrum. Because Vaughan wrote about the jury in criminal cases quite generally, however, I do not think the context of the case necessarily disposes of the matter.

traditionalist lines. Even new ideas were commonly made to appear time-out-of-mind, or were hinted at only implicitly and in veiled language, especially if, when broadly stated, they might pose collateral threats to the stability of the formal law. At that point, they were not only beneath notice but beneath contempt. This legalist approach, when applied to issues central to the legal system as a whole, represented a constrained form of constitutionalism—not the “just-is” variety, but something still far short of a full airing of the considerations that lay behind the decision. Given the resulting opacity, Whitman’s and Crosby’s important contributions to context might well inform the historian about what really moved Vaughan, then again they might not. They might instead, by multiplying the possibilities regarding what really moved Vaughan, *increase* the mystery, making the old chestnut that is the opinion even more difficult to crack.

Now one might fairly insist that what the opinion in *Bushel’s Case* stood for was not strictly—or even mainly—a matter of what really *and consciously* moved Vaughan. Judicial opinions have meanings beyond that. Those meanings depend upon the eyes and ears, the reasoned inferences, the informed intuitions of those who read and/or hear them. A judge does not control the meaning of the law embedded in a living opinion, merely that of his own personal intentions embedded in his writing that opinion, which remain personal to him and are not thereby necessarily the “law” he has produced. This makes context crucial to our understanding of the law, of the contemporary understanding of the meaning of Vaughan’s opinion. But whatever they might think about this perspective, I suspect Whitman and Crosby would say that what really moved Vaughan is indeed of importance and, further, that context tells us what really and consciously moved him, so that the only question left to be resolved is why he was so indirect, so implicit—so opaque.

In resisting the conclusion that the newly proposed contexts necessarily reveal Vaughan’s thinking (or, even, his subconscious motivations), I want to return to what I think we all take to be the crux of the opinion, the issue of personal knowledge. The out-of-court variety has ancient roots and increasingly diminished importance; it thus seems least affected by late-seventeenth century trends of thought. Still, a possible link between the out-of-court and the in-court variety remained: jurors might have been

thought to assess credibility and even the meaning of factual narratives in light of what they knew, not of the "facts" as such, but generally of local life, mores, and circumstances. That was—and remains—an oft-cited reason for (what remains of) the vicinage rule.

Jury assessment of in-court testimony and demeanor lies at the heart of the matter, and always had. It could be defended on its own terms. It connected seamlessly with the fact that the defendant had put himself "on the country" rather than on the bench. It connected, too, with the politics of central versus local control, and, with the political economy of the taking of life by command of the law. Its connection with another of Vaughan's apparently leading reasons—that if the judge may decide fact, what is the point in using a jury—of course begs the question, why, indeed, use a jury. But from Vaughan's perspective the fact that the English did use juries, and had for the past 450 years (rather than the instrumental considerations just noted), might have—for all we know—rendered conjectures as to the answer of the begged question *ultra vires*. Legalism/constitutionalism had, as it were, a life of its own. I myself wonder whether it is entirely fanciful to suggest that this "life of its own" led Vaughan to erase the Restoration, to consider its politics irrelevant (except in so far as they reflected what he deemed a proper respect for the constitutional position of the jury) and the recent instances of fining not "precedents" but, instead, judicial actions whose legality were themselves *sub judice* in *Bushel's Case*.

None of this denies that "moral comfort"—in this case that of the bench—helps to explain why the English adopted and then clung to the jury, especially in cases of blood. Nor does it deny that judges, Vaughan included, were well aware of this, despite their reticence about listing it as a reason for using the jury, much less specifying it as a reason for allowing discretion to the juries on which the bench had off-loaded the "peril" involved in judging. Nor does it deny that, by the late-seventeenth century, the sort of *de facto* jury independence that had always been a corollary of its powers of in-court assessment of testimony and demeanor had, as Crosby would have it, been theorized in some quarters in terms of a new form of constitutional independence. And those who might conjecture that Vaughan's attention to "eyes and ears," etc., bespeaks the influence of late-seventeenth-century science (here, epistemology) might also have



a point.<sup>23</sup> All that it denies is that we can yet know from context what the text meant, as Vaughan created and understood it.

#### THE TEXT IN THE CONTEXT OF DOING HISTORY

I have fenced off, for lack of space, some important issues of context. So too did Vaughan fence them off, and one of my central points has been that we don't yet know just why he did so. There is still plenty of room for further assessment of the context of *Bushel's Case*. I mean to encourage that assessment, but, as is clear, I hope also to encourage further discussion of Vaughan's opinion—of the text itself. It has always struck me as an odd composition, at a few points tantalizingly of its day, but mainly resolutely a voice from the past that resonates far less than we might expect with Restoration events and thought.<sup>24</sup> In that regard, it remains something of a mystery, and just why it remains so is a question worthy of historians' interest, even if one of less moment than questions about Restoration jury theory more generally.

The form and content of Vaughan's opinion bear relation not only to what Vaughan thought about the questions raised by *Bushel's Case* but also to a broader matter not yet addressed in this essay. That matter is what might be called the "silent power" of the criminal trial jury, evident from its inception down to modern times. Like almost any institution or process, the criminal trial jury produced unintended effects, and given its place in the political and social order, the jury's effects were bound to be of special importance. Some thirty years ago, I noted—by way of tentative hypotheses—some of these effects. For example, *de facto* jury law-finding (or, if you prefer, highly discretionary fact-finding) created a rough-and-ready distinction between murder and manslaughter well before the law began to give formal recognition to that distinction in the sixteenth century. I sug-

23. On the theme of the new epistemology, see Barbara J. Shapiro, *Probability and Certainty in Seventeenth-Century England: A Study of the Relationships Between Natural Science, Religion, History, Law and Literature* (Princeton, Princeton University Press, 1983), ch. 5.

24. I have, for lack of space, omitted discussion of Vaughan's fascinating handling of the question whether the writ of attainder pertained to criminal cases. He concluded that it did not, thus depriving himself of an easy out: if attainder was available, the fining of jurors would raise the possibility of "double jeopardy."

gested that centuries of trial-jury practice were influential in the emergence of this formal legal development, whether or not those who legislated the change were aware of that influence, so that what came from "above" ultimately derived from what existed "below." In similar fashion, longstanding jury practice might well have played a "silent" role in the legislating of clergyability for much simple larceny. And so on.<sup>25</sup>

At another level, the criminal trial jury played a role in the production of its own staying power. To be sure, this institutional permanence resulted from a matrix of decisions by legal, political, and social actors in accordance with their interests. The jury, in this regard, was object not subject; it was acted upon. Yet the power of the idea of the jury might be said to have emanated in part simply from the jury's being what it was—from its having become an inviolable part of the constitution. This is difficult to separate conceptually from the "interest" possessed by that other legal actor, the judge, in remaining true to the law, and certainly to constitutional principles. It is perhaps a matter of taste whether or not we ascribe to the jury itself some power in the maintenance of the particular judicial fidelity to the robe that manifested itself in the bench's legitimation of the jury, but Vaughan's opinion, which at points reads a bit like settled conviction in search of a rationale, might be deemed testimony to this particular silent power of the jury.

Present ideas can be born from age-old practices originally created to serve distinct interests. Those practices, and indeed those interests, might live on, but so might a later-emerged but by now well-aged idea of the appropriateness—even constitutionally-required essence—of the practice itself. The constitutional requirement of determination of criminal guilt by a lay jury under instructions from the judge as to the law the jury must apply to the facts it found was an idea that lived on alongside the idea that it was in the interest of judges as individuals and of the state as defender of the law that a lay jury be seen to have shouldered the civil duty of determining criminal responsibility.<sup>26</sup> That Vaughan did not invoke the latter idea hardly means that it didn't occur to him, or, even, that it wasn't the driving force behind his opinion. It suffices to say, however, that the form and substance

25. Green, *Verdict According to Conscience*, especially 125, 147, 314–15, n. 146, 377–82.

26. Whitman, *Origins of Reasonable Doubt*, 178–84, rightly emphasizes the idea of duty in writings in the aftermath of *Bushel's Case*.

of that opinion leave open the possibility that little more than the appeal of a vital abstraction was at work. And the question of the proportional influence of the many forces (political, social, religious, or otherwise philosophical) driving the appeal of that abstraction is still open for historical investigation.

### CONCLUSION

There can be no certainty about the ultimate success of such investigation. The text, taken by itself, might prove forever unyielding, and as for the hope that study of the context will elucidate the text, it might turn out that one just can't get here from there. Of course, historians wouldn't necessarily know that success was utterly foreclosed, so they likely would go on trying to unveil the meaning of the text via new insights regarding context. I think Charlie would count the possibility of ultimate irresolution part of the challenge and not a bad thing—anyway, not a tragedy. I wonder, though, whether he would go a further step. Is he sufficiently perverse—as I surely am—to think that, in this particular context, absolute certainty would be regrettable?

Suppose, for example, an historian discovered a letter verifiably from Vaughan to a friend that explained the "true" rationale of his opinion in laborious detail. Such a document would be a real find. It would merit publication, and were the finder a junior in the profession, it would make a nice contribution to his or her tenure file. We would, finally, *really* know what Vaughan was thinking. Bliss!

But would we not have lost something? One more old chestnut down the drain. There aren't many such cases that so powerfully test the historian's archival skills and imagination. It is true that Vaughan's actual motivations, once learned, might be of considerable interest and might themselves spin off new problems that would go part way to off-set the loss. I can't help feeling, however, that they would go only part of the way, and no more.